The Gaza War and International Law: An Informed Assessment

By Prof. Louis René Beres | October 30, 2023

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EXECUTIVE SUMMARY: In its obligatory war against Palestinian terror – a criminal process encouraged and sustained by Iran – Israel is acting within the bounds of pertinent international law. Though this assessment is difficult to acknowledge by many who can see only the tangible effects of Israeli military counterterrorism, it is offered here from the informed standpoint of authoritative legal standards. Palestinian civilian casualties of Operation Swords of Iron are the predictable and indeed intended result of Hamas's perfidy. It is beyond legal question that the original Hamas terror acts of October 7, 2023, which included murder, rape, and hostage-taking, represent egregious, Nuremberg-level violations of humanitarian international law.

Among the subjective charges leveled against Israel in its current Gaza War operations is "disproportionality." But what exactly does this mean? What are the identifiable legal requirements of "proportionality" specified under humanitarian international law?

The obligations of proportional combat are contained in rules governing the resort to armed conflict ("justice of war") and in rules governing the conduct of hostilities ("justice in war"). In the former, in part, proportionality concerns "existential" rights of national self-defense. In the latter, proportionality relates to the particular manner in which an act of belligerency is carried out. Proportionality is largely derived from the more basic legal principle that belligerent rights

have specific constraints. For example, Hague Convention No. IV (1907), Annex to the Convention, Section II (Hostilities), Art. 22, stipulates: "The right of belligerents to adopt means of injuring the enemy is not unlimited."

To make informed legal judgments on what is happening in the current Gaza War, relevant details and particularities should be identified. In the law of war, words matter. Though generally misunderstood, the legally correct meaning of proportionality has nothing to do with equivalence in the use of military force. Equivalence or symmetry is never a correct requirement of the law of war.

In the law of war, the standard of proportionality is never just a matter of intuition or "common sense." It is a matter of *reason*, an integral foundation of both codified and customary international law. Above all, this standard seeks to ensure that every belligerent's resort to armed force remains limited to what is "necessary" to meet law-based military objectives.

The related principle of "military necessity" is correctly defined as follows: "Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied."[1]

In present-day circumstances, though we still speak narrowly of "international law," belligerents include not only states but also insurgent and terrorist armed forces. This means that even where an insurgency is presumptively lawful – that is, where it seemingly meets the settled criteria of "just cause" – it must still satisfy all corollary expectations of "just means." To the issue here at hand, even if Hamas and associated terror groups have a presumptive right to fight against an Israeli "occupation," that fight still needs to respect core law-based limitations of "discrimination," "proportionality" and "military necessity." **Deliberately firing rockets into Israeli civilian areas and/or placing military assets amid Palestinian civilian populations always represents a perfidious crime of war.**

In law, the correct term for the crime of employing "human shields" is "perfidy."

But misunderstandings continue to be widespread. Under no circumstances does the principle of proportionality stipulate that either party to an ongoing conflict must impose only symmetrical or equivalent harm upon the enemy. If that sort of "common sense" suggestion were acceptable, there would be no modern historical analogue to America's flagrantly "disproportionate" attacks on European and Japanese cities during World War II. By that standard, Dresden, Cologne, Hiroshima and Nagasaki would reasonably represent the documented nadir of inhumane and lawless belligerency. Expressed differently, these US attacks would represent the modern world's very worst violations of humanitarian international law.

Perfidy represents greater wrongdoing than simple immorality or visceral cowardice. It expresses a starkly delineated and punishable crime. More precisely, it is identified as a "grave breach" in Article 147 of Geneva Convention IV.

Deception can be lawful in armed conflict, but The Hague Regulations explicitly disallow any placement of military assets or personnel in populated civilian areas. Related prohibitions of perfidy can be found in Protocol I of 1977, additional to the Geneva Conventions of August 12, 1949. These rules are also binding on the basis of customary international law, a jurisprudential source identified in Article 38 of the Statute of the International Court of Justice.

All combatants, including Palestinian insurgents allegedly fighting for "self-determination," are bound by the law of war. This core requirement is found in Article 3, common to the four Geneva Conventions of 1949. It cannot be suspended or abrogated.

The alleged Hamas goal of Palestinian self-determination is actually founded upon an openly planned crime; that is, the total removal of the Jewish State by attrition and annihilation. This legally impermissible orientation has its basis in the PLO's "Phased Plan" of June 9, 1974. In its 12th Session, the PLO's highest deliberative body, the Palestinian National Council, reiterated the PLO aim as being "to achieve their rights to return, and to self-determination on the whole of their homeland."

The proposed sequence of Palestinian violence is expressed as follows: FIRST, "to establish a combatant national authority over every part of Palestinian territory that is liberated" (Art. 2); SECOND, "to use that territory to continue the fight against Israel" (Art. 4); and THIRD, "to start a Pan-Arab War to complete the liberation of the all-Palestinian territory" (Art. 8).

Significantly, this is the annihilationist plan of a more mainstream Palestinian terror group than Hamas, an organization that Hamas considers too moderate.

At some point, Hamas (with tangible Iranian support) could prepare to launch mega-terror attacks on Israel. Such perfidious aggressions, unprecedented and in plausible cooperation with certain allied non-Palestinian jihadists (e.g., Shiite Hezbollah) could include chemical, biological or radiological (radiation-dispersal) weapons.

Perils could also include a non-nuclear terrorist attack on the Israeli reactor at Dimona. There is a documented history of enemy attempts against this Israeli plutonium-production facility, both by a state (Iraq) in 1991 and by a Palestinian terror group (Hamas) in 2014. Neither attack was successful, but various threatening precedents were established.

International law is not a suicide pact. Even amid long-enduring world-system anarchy, it offers an authoritative body of rules and procedures that permits a beleaguered state – *any* beleaguered state – to express an "inherent right of self-defense." But when Hamas celebrates the explosive "martyrdom" of Palestinian civilians, and when Palestinian leaders seek "redemption" or power over death through the mass murder of "Jews" or "Zionists," the wrongdoers have no residual claims to immunity from civilian harms. Hamas celebrations of "martyrdom" underscore the two-sided nature of Palestinian terror/sacrifice – that is, the sacrifice of "the Jew" and the reciprocal sacrifice of "the Martyr." Such reasoning is explicitly codified within the Charter of Hamas as a "religious" problem.

Under international law, terrorists are considered *hostes humani generis* or "common enemies of humankind." Among other things, this category of criminals invites punishment wherever the wrongdoers can be found. Concerning their required arrest and prosecution, jurisdiction is now "universal." Also relevant is that the universality-clarifying Nuremberg Tribunal strongly reaffirmed the ancient legal principle of *Nullum crimen sine poena*, or "no crime without punishment."

There is a non-legal but still important observation that remains germane to Hamas's allegations of Israeli "disproportionality." To wit, many Palestinian commanders who control terror-mayhem against Israel continuously cower unheroically in safe towns and cities outside of Gaza. *Prima facie*, theatrical rhetoric notwithstanding, these cowardly commanders are never eager to become "martyrs" themselves.

What next? In law – all law – truth is exculpatory. Regarding the current Gaza War, the pertinent truth is unambiguous. Israel is once again waging a necessary war against a determinedly exterminatory foe, this time a jihadist terrorist organization that seeks genocide for Israel, eternality for its "martyrs" and safety for its criminal leaders. In assessing such bitter circumstances, the "international community" should finally begin to take more seriously the core truth of Hamas's perfidy and the reciprocal falsehood of Israeli "disproportionality."

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Prof. Louis René Beres, *Emeritus Professor of International Law at Purdue, is a frequent contributor to major law and strategy journals and to BESA publications. He is the author of many books and articles dealing with war, terrorism and international law.*

[1] See United States, Department of the Navy, jointly with Headquarters, U.S. Marine Corps; and Department of Transportation, U.S. Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, Norfolk, Virginia, October 1995, p. 5-1.

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